No. 6112

United States

Circuit Court of Appeals

For the Ninth Circuit.

SWIFT AND COMPANY, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of West Virginia,

Appellant,

vs.

FREDA DALY, as Administratrix of the Estate of STEWART DALY, Deceased,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Montana.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

Index. Page

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

H. LOWNDES MAURY, Esq., Butte, Montana,
R. LEWIS BROWN, Esq., Butte, Montana,
GEORGE R. MAURY, Esq., Butte, Montana,
Attorneys for Plaintiff.

JOHN K. CLAXTON, Esq., Butte, Montana,
A. C. McDANIEL, Esq., Butte, Montana,
Attorneys for Defendant.

In the District Court of the United States in and for the District of Montana.

No. 507.

FREDA DALY, as Administratrix of the Estate of STEWART DALY, Deceased,
Plaintiff,

vs.

SWIFT & COMPANY, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of West Virginia,
Defendant.

BE IT REMEMBERED that on April 13th, 1929, plaintiff filed its complaint herein in the words and figures following, to wit: [1*]

In the District Court of the United States in and for the District of Montana.

No. ——.

FREDA DALY, as Administratrix of the Estate of STEWART DALY, Deceased,

Plaintiff,

vs.

SWIFT & COMPANY, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of West Virginia,

Defendant.

COMPLAINT AT LAW.

The plaintiff complains and alleges:

I.

That at all times herein mentioned the defendant Swift & Company was and now is a corporation organized and existing under and by virtue of the laws of West Virginia, a citizen of West Virginia and doing business in Montana engaged in the refrigeration, packing and selling of meats and particularly at its packing plant at 724 South Arizona Street in Butte, Silver Bow County, Montana.

*Page-number appearing at the foot of page of original certified Transcript of Record.

II.

That the plaintiff is a citizen and at all times herein mentioned was a citizen of the State of Montana and this action at law is entirely between citizens of different states, to wit, the defendant, which is a citizen of the State of West Virginia and plaintiff, who is a citizen of Montana, and the amount involved in this action at law, exclusive of interest and costs is in excess of the sum of Three Thousand ($3,000.00) Dollars, to wit, it is the sum of Twenty Thousand ($20,000.00) Dollars.

III.

That on or about the 28th day of August, 1928, Stewart [2] Daly died a resident of Silver Bow County, Montana, of the age of 11 years, 8 months and 22 days, and no older. That thereafter, and on the 13th day of April, 1929, by an order and judgment duly given and made by and in the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, Freda Daly, mother of said Stewart Daly, was appointed administratrix of the estate of Stewart Daly, deceased, she thereupon qualified by taking oath and giving bond as required by law and such order, letters of administration thereupon on said 13th day of April, 1929, were duly issued to her, and such letters have not been revoked; she is the administratrix of the estate of Stewart Daly, deceased.

IV.

That at all times herein mentioned the defendant

Swift & Company owned a certain packing plant of two stories and basement, a building at 724 South Arizona Street in the City of Butte, Silver Bow County, Montana, and had many servants working therein and occupied, controlled, possessed, and packed meats in, the said packing plant.

That there was in the basement thereof, about the 1st day of August, 1928 (and until the work of removing the same herein described), the property of, and in use by defendant, an ice-making plant, consisting of many pieces put together of iron or steel, some pieces of which weighed as much as 1350 pounds. That for the purpose of improving its plant and business, Swift & Company desired to install in said basement a better ice plant, and in order to do so desired to have the old ice plant removed from its building in order to make room for the new one contemplated. That defendant bought of York Ice Machine Company a new plant, and as part of the conditions of purchase, the exact terms of which are unknown to plaintiff, [3] York Ice Machine Company engaged with Swift & Company to remove the old plant, up and out of the building by the only possible exit for the same, a certain freight elevator, such being the only exit without boring the wall of the building, which was not agreed to by Swift & Company.

VI.

That while carrying on the design and desires of Swift & Company to get the old ice-making plant out of its basement York Ice Machine Company

sold the said plant to one David Mottleson, a junk dealer, for $15.00 on condition that he would remove the old plant up through the elevator and out of the building. That though perhaps, York Ice Machine Company and Mottleson were so-called independent contractors (and plaintiff is ignorant of the exact terms of the contract between York Ice Machine Company and Swift & Company, and of the terms of the contract between Mottleson and York Ice Machine Company), yet at all times both Mottleson and York Ice Machine Company were, in making the said contracts and in doing the work hereinafter set out, furthering solely and entirely the plan of work and the business desires and designs of defendant, Swift & Company in its premises, in its plant, at all times occupies, owned, controlled and possessed by it, the defendant, and in which it was carrying on its business and intending to carry on its business thereafter and such work was for the purpose of improving the business methods of Swift & Company.

VII.

That pieces of the old ice plant weighed and were known by Swift & Company to weigh as much as 1350 pounds; that the elevator was one of unusual design and mechanism and due care required and demanded that one trained in the handling of said elevator be always controlling the same while such elevator was in use lifting such machinery; that the said elevator started with a jump and jerk and could not be quickly brought [4] to a stop and

unless the rope of control were "pulled" "far enough" the motor would burn out, the same being run by rope control and electric power, and such condition of such elevator was known to Swift & Company, and it negligently advised Mottleson before he used the elevator at all to be sure to pull the rope "far enough"; that Swift & Company, negligently failed to warn Mottleson of the tendency of the said elevator to start with a jerk and jump and negligently failed to warn him that it could not be brought to a quick stop, and negligently failed to place any trained man in control of said elevator while the old machinery was being lifted as herein set out until after the injury to Stewart Daly hereinafter alleged. That to do such work a crew of four or more grown men, skilled in such work was needed for the preservation of the safety of all concerned in it, that Swift & Company knew it was being done, and negligently permitted it to be done, with only two men and the child, Stewart Daly.

That the work of removing the said old ice plant up the freight elevator was inherently and intrinsically of greatest danger to all persons concerned about the work, even if due and extraordinary care were exercised, and the duty of Swift & Company, as owner, occupier, possessor, user of said plant to use due care, for the safety of all invitees into its premises of which Stewart Daly was one, in the prosecution of such work in the furtherance of its business was a nondelegable one, whether Swift & Company did the same by hired servants or con-

tractor or subcontractor. That such work so being prosecuted by Swift & Company on its premises constituted and was an attractive but dangerous nuisance to active boys of the age of Stewart Daly, that Swift & Company negligently failed to prevent his access to such place of danger and in fact negligently and impliedly invited him into the same and [5] knowing for several days of his presence there, negligently failed to exclude him.

VIII.

That on Monday, the 20th day of August, 1928, Stewart Daly (without any knowledge of either of his parents of the kind or character of work which he was doing, or the place where he was working, until after the injury hereinafter set out), was employed as a casual servant of David Mottleson and was an invitee of Swift & Company into and about the said basement and elevator shaft and elevator and worked daily and continuously from Monday, the 20th day of August, 1928, until Friday, the 24th day of August, 1928, in helping to remove said machinery up the elevator shaft by means of the freight elevator in the premises of Swift & Company.

IX.

That continuously eight hours each day or thereabouts from Monday, the 20th day of August, 1928, until Friday, the 24th day of August, 1928, Swift & Company being engaged in business in Montana, knowingly and negligently and wrongfully and unlawfully permitted to be employed and to render

and perform services and labor in, on, and about a certain freight elevator in its plant at 724 South Arizona Street in Butte, Silver Bow County, Montana, Stewart Daly, a child under the age of 16 years, to wit, of the age only of 11 years 8 months and 22 days, and the said elevator being in operation constantly during such time, and such employment and service and labor of the said child, Stewart Daly, being at all times, until after he was injured, unknown to Philip Daly the father of the said child and unknown to the mother this administratrix, and such conduct of Swift & Company was a proximate and efficient and a direct cause of the injury to Stewart Daly, hereinafter set out, and the elevator in motion overturned on Stewart Daly the [6] half fly-wheel and so injured him that he died after lingering about three days.

X.

That on Friday, the 24th day of August, 1928, in the course of said work, half of the fly-wheel, the said half weighing about 1350 pounds, was being loaded on said elevator and the same was ends up resting on its circumference projecting over the elevator shaft, and Stewart Daly was helping to steady the said fly-wheel, and while David Mottleson (entirely unskilled and known by the defendant to be unskilled in handling the said elevator, or the defendant could, in the exercise of ordinary care have known that Mottleson was unskilled) was driving it, the said elevator started with a jerk from some distance below the floor whereon the

said half fly-wheel was resting, and without power in Mottleson to stop the same at the floor it jumped past the floor, struck the fly-wheel, turned it over on the foot of Stewart Daly and crushed the same; that Stewart Daly was thereby grievously injured and such injury was due to the negligent and unlawful acts of the defendant hereinbefore set out; that Stewart Daly was immediately after such injury given all possible and reasonable and skillful medical and surgical attention, but due to such injury, infection set into the leg and such injury along with, and as a cause and medium of such infection, caused the death of Stewart Daly three days later; that such injuries and such negligent and unlawful conduct of the defendant, Swift & Company caused Stewart Daly during his lifetime great pain and suffering of mind and body, and completely destroyed for all time Stewart Daly's capacity to earn money; that Stewart Daly was a healthy, strong, active, earnest and energetic good boy; that he lived (and he would have lived 47.45 years but for the acts of the defendant) after he became 21 years of age he would have earned for himself [7] much money, to wit, at least the ordinary wages paid in Butte, Montana, for ordinary labor, that is to say, more than $5.00 per day thirty days per month; that he would have enjoyed, but for the acts of the defendant, a long useful and happy life, and earned much money of his own above his needs for living, after he became 21 years of age.

XI.

That Stewart Daly survived the said injuries three days and during his lifetime had a cause of action against the defendant by virtue of the facts hereinbefore set out, that such cause of action was never prosecuted during his lifetime; that under the laws of Montana it survives to his administratrix, this plaintiff.

XII.

That the defendant by reason of the acts herein set out damaged Stewart Daly and caused him loss in the sum of Twenty Thousand ($20,000.00) Dollars, no part of which has ever been paid.

WHEREFORE, this plaintiff demands judgment against the defendant for the sum of $20,000.00 and interest from August 28th, 1928, and for her costs of suit.

MAURY, BROWN & MAURY,
Attorneys for Plaintiff.

FREDA DALY,
Plaintiff. [8]

State of Montana,
County of Silver Bow,—ss.

Freda Daly, being first duly sworn on her oath, deposes and says, that she is the plaintiff named in the foregoing complaint; that she has read the same and knows the contents thereof, and that the same is true of her own knowledge, except those matters stated on information and belief and as to those she believes them to be true.

FREDA DALY.

Subscribed and sworn to before me this 13th day of April, 1929.

[Notarial Seal] JOSEPHINE BLAKE,
Notary Public for the State of Montana, Residing at Butte, Montana.

My commission expires June 25, 1929.

Filed April 13, 1929.

THEREAFTER, on May 4th, 1929, defendant's demurrer to the complaint was filed herein in the words and figures following, to wit: [9]

[Title of Court and Cause.]

DEMURRER TO COMPLAINT.

The defendant demurs to the complaint herein and for grounds of demurrer alleges:

1.

That the complaint does not state facts sufficient to constitute a cause of action.

2.

That the complaint is uncertain in this:

A. It alleges that Stewart Daly was employed on the premises and also alleges that he was an invitee on the premises.

B. The complaint alleges that the York Ice Company contracted to remove the old ice plant, install a new plant and that the York Ice Company sold the old plant to one David Mottleson. A

showing of the relation of independent contractor yet the complaint alleges that the injuries to Daly were caused by the defendant and that the defendant wrongfully permitted Daly to be employed.

C. The complaint alleges defects in the elevator causing the injuries and in another place alleges that the negligence of Mottleson in operating the elevator caused the injuries and in another place alleges that the defendant failed to instruct Mottleson in the use and operation of the elevator. [10]

D. It cannot be determined who the plaintiff alleges caused the injuries, whether the York Ice Company, Mottleson or the defendant.

E. The complaint alleges that Mottleson purchased the old ice plant from the York Ice Company and agreed to remove the plant yet also alleges that the defendant in the exercise of ordinary care should have known Mottleson was unskilled in operating the elevator thereby alleging Mottleson to be the servant or agent of the defendant and it cannot be determined whether the plaintiff means to allege the relation of independent contractor on the part of the York Ice Company and Mottleson or either of them, or whether they or either of them were the servants, agents or employees of the defendant or whether the defendant is to be liable for defective machinery or for negligence of its agents or servants, if any.

3.

That said complaint is ambiguous for each of the reasons it is uncertain.

4.

Said complaint is unintelligible for each of the reasons it is uncertain.

A. C. McDANIEL,
JOHN K. CLAXTON,
Attorneys for Defendant.

Service of the foregoing demurrer to complaint admitted and copy received this 3d day of May, 1929.

MAURY, BROWN and MAURY,
Attorneys for Plaintiff.

Filed May 4, 1929. [11]

THEREAFTER, on May 14, 1929, minute entry on order overruling defendant's demurrer was duly entered herein in the words and figures following, to wit: [12]

[Title of Court and Cause.]

MINUTES OF COURT—MAY 14, 1929—ORDER OVERRULING DEMURRER.

Counsel for respective parties present in court, H. L. Maury, Esq., appearing for the plaintiff, and A. C. McDaniel, Esq., appearing for defendant. Thereupon defendant's demurrer was called up and argued by counsel, and submitted to the Court, being filed by plaintiff. Thereafter, the Court, after due consideration, ordered that said demurrer be and is overruled.

Entered in open court this 14th day of May, 1929.

C. R. GARLOW,
Clerk.

THEREAFTER, on May 24th, 1929, answer was filed herein in the words and figures following, to wit: [13]

[Title of Court and Cause.]

ANSWER.

The defendant answering the complaint admits, denies and alleges:

1. The defendant admits: The allegations of Paragraphs one, two and three of the complaint; that the defendant owned a certain building or packing plant in the city of Butte, Montana, and had servants working therein, and occupied, controlled, possessed, and packed meats in, said building; that on or about the 1st day of August, 1928, the defendant had in the basement of said building a certain ice-making plant made of iron and steel; that the defendant desired to have installed in said building another ice plant, and to have the old ice plant removed; that the defendant purchased of York Ice Company another ice plant, and as a part of the terms of such purchase the York Ice Company agreed to remove the old plant out of said building, and alleges that as a part of said transaction the said old ice plant was sold to said

York Ice Company; that said York Ice Company sold said old ice plant to one David Mottleson for $15, and as part of the terms of such sale and purchase the said Mottleson agreed with said York Ice Company to remove said old ice plant out of said building; that the elevator in said building was run by a rope and electric power; that on the 20th day of August, 1928, said Stewart Daly was employed as the servant of said Mottleson and continued in the service of said Mottleson until August 24, 1928; that the portion of the fly-wheel about to be put on said elevator projected over the elevator shaft; that said Stewart Daly died on the 28th day of August, 1928; that no sum has been paid plaintiff.

2. Save and except as herein specifically admitted, the defendant denies each and every allegation and all of the allegations of said complaint.

3. Admits that Stewart Daly was injured. [14]

For an affirmative defense, defendant alleges:

1. That said Stewart Daly from August 20, 1928, to August 24, 1928, was employed by said David Mottleson; that in the course of his employment said Stewart Daly took orders from said Mottleson only, and worked with and under said Mottleson, and they, said Daly and Mottleson, were engaged in the same work, namely, removing the said old ice plant; that in the course of their said work they placed a portion of the fly-wheel of said old ice plant (which old ice plant was owned by said David Mottleson, and he was engaged in the performance of labor for himself) so that it projected into the elevator

shaft in such a manner that it could and would be struck by the elevator when the elevator was in operation; that while said portion of the fly-wheel was in such position the said Mottleson, in some manner unknown to the defendant, without authority operated said elevator so that it struck said fly-wheel and caused it to fall; that any injuries inflicted upon the said Stewart Daly were caused by the said negligence of a fellow-servant, his own employer and coservant.

WHEREFORE, defendant having fully answered prays judgment that the plaintiff take nothing by this action, and that defendant be dismissed hence with its costs.

JOHN K. CLAXTON,
A. C. McDANIEL,
Attorneys for Defendant. [15]

State of Montana,
County of Silver Bow,—ss.

John K. Claxton, being first duly sworn, says: That he is one of the attorneys for the within named defendant, and makes this verification for and on behalf of said defendant for the reason that no officer of said defendant corporation is within the county of Silver Bow, Montana; that he has read the said answer and knows the contents thereof; that the matters stated in said answer are true to his best knowledge, information and belief.

JOHN K. CLAXTON.

Subscribed and sworn to before me May 23, 1929.

[Notarial Seal] CARL J. CHRISTIAN,
Notary Public for the State of Montana, Residing at Butte, Montana.

My commission expires Mar. 14, 1931.

Service of the foregoing answer acknowledged and copy received May 23, 1929.

MAURY, BROWN & MAURY,
Attorneys for Plaintiff.

Filed May 24, 1929.

THEREAFTER, on May 28, 1929, reply was filed herein in the words and figures following, to wit: [16]

[Title of Court and Cause.]

REPLY.

The plaintiff for her reply to the answer of the defendant and to the affirmative defense therein admits, alleges and denies, as follows:

I.

Admits that Stewart Daly between August 20th, 1928, and August 24th, 1928, was employed by David Mottleson.

Admits that he took orders from David Mottleson, and worked with and under said Mottleson, and that they, said Daly and Mottleson, were engaged in the work of removing the old ice plant; within the course of the work they placed a por-

tion of the fly-wheel of the said ice plant so that it projected into the elevator in such a manner that it could and would be struck by the elevator when the elevator was in operation, and that the elevator struck the fly-wheel and caused it to fall.

Admits that Stewart Daly was a coservant of Swift & Company with David Mottleson.

Denies generally each and every allegation in the said affirmative defense save such as are hereinbefore specifically admitted.

WHEREFORE, having fully replied she prays for judgment [17] in accordance with the prayer of her complaint.

MAURY, BROWN & MAURY,
Attorneys for Plaintiff.

State of Montana,
County of Silver Bow,—ss.

Freda Daly, being first duly sworn on her oath, deposes and says, that she is the plaintiff named in the foregoing complaint; that she has read the same and knows the contents thereof, and that the same is true of her own knowledge.

FREDA DALY.

Subscribed and sworn to before me this 25 day of May, 1929.

[Notarial Seal]

DOMITRE A. BATCHOFF,
Notary Public for the State of Montana, Residing at Butte, Montana.

My commission expires Aug. 8th, 1930.

Service of the above and foregoing reply admitted and copy received this 28th day of May, 1929.

A. C. McDANIEL and
JOHN K. CLAXTON,
Attorneys for Defendant.

Filed May 28, 1929.

THEREAFTER, on December 23, 1929, said cause was duly tried, the record of said trial being in the words and figures following, to wit: [18]

[Title of Court and Cause.]

TRIAL.

This cause came on regularly for trial this day, Messrs. Maury, Brown and Maury, appearing for the plaintiff, and J. K. Claxton, Esq., and A. C. McDaniel, Esq., appearing for the defendant herein.

Thereupon the following named persons were duly impanelled, accepted and sworn as a jury to try the cause, viz.:

Paul MacDonald, T. F. Riley, John Sanders, B. F. Penn, Lee Reece, W. W. Harper, Chas. Savant, Thos. E. Elliott, J. W. Whitehead, Chas. Wilson, M. A. Fulmore and John Eathorne.

Thereupon Frank J. Williams, Dave Mottleson, Freda Daly, Phil Daly, Joe Coppo and John Visnes were sworn and examined as witnesses on behalf of plaintiff and a certain offer of proof was submitted to the Court, which offer of proof was

denied and exception of plaintiff noted, whereupon plaintiff rested.

Thereupon defendant moved the Court to grant a nonsuit and for dismissal of the complaint for lack of proof to show any liability on the part of Swift and Company, which motion was duly argued and submitted and by the Court denied, the exception of the defendant being duly noted.

Thereupon T. J. McKinley, W. G. Young, Reynold J. McDonald, F. R. Jones, Walter J. Ritchie and Oscar Henderson were sworn and examined as witnesses for defendant and Dave Mottleson was recalled and testified as a witness for defendant, and Plaintiff's Exhibit No. 1, being a certain blueprint diagram of the basement of the Swift and Company plant in Butte, Montana, offered and admitted, whereupon defendant rested.

Thereupon after the arguments of counsel, the plaintiff moved the Court to pre-emptorily instruct the jury to return a verdict for plaintiff, which motion was duly granted, whereupon after the instructions of the Court the jury retired to consider of their verdict. Thereafter the jury returned into court with the following verdict, viz.:

> "We, the jury in the above entitled cause do find our verdict in favor of the plaintiff above named, Freda Daly, as Administratrix of the Estate of Stewart Daly, Deceased, and against the defendant, above named, Swift & Company, a corporation, and do assess the plaintiff's dam-

age in the sum of ($5,000.00) Five Thousand Dollars.

M. A. FULMORE,
Foreman."

Thereupon judgment ordered entered accordingly. Thereupon on motion of defendant, Court ordered that said defendant be granted 20 days additional time within which to prepare, serve and file a bill of exceptions herein.

Entered in open court this 23d day of December, 1929.

C. R. GARLOW,
Clerk. [19]

THEREAFTER, on December 23, 1929, verdict of the jury was duly filed herein in the words and figures following, to wit: [20]

[Title of Court and Cause.]

VERDICT.

We, the jury in the above-entitled cause, do find our verdict in favor of the plaintiff above named, Freda Daly as administratrix of the estate of Stewart Daly, deceased, and against the defendant, above named, Swift & Company, a corporation, and do assess the plaintiff's damage in the sum of ($5,000.00) Five Thousand Dollars.

M. A. FULMORE,
Foreman.

Filed Dec. 23, 1929.

THEREAFTER, on December 24th, 1929, judgment was duly entered herein in the words and figures following, to wit: [21]

In the District Court of the United States, in and for the District of Montana.

FREDA DALY, as Administratrix of the Estate of STEWART DALY, Deceased,
Plaintiff,

vs.

SWIFT & COMPANY, a Corporation,
Defendant.

JUDGMENT.

BE IT REMEMBERED, that this cause came on for trial before the Court and the jury on the 23d day of December, 1929; plaintiff was represented by her counsel, Messrs. Maury Brown & Maury, the defendant by its counsel, John K. Claxton and A. C. McDaniel, Esqrs.; witnesses were sworn and testified on behalf of the plaintiff and the defendant and after the evidence was closed the cause was argued to the jury by counsel for each of the parties, and thereupon the jury was charged by the Court as to the law; thereupon the jury retired to consider of their verdict and thereafter returned into court with their verdict, which is in words and figures following, to wit:

(After title of Court and Cause.)

"We, the Jury in the above-entitled cause, do find our verdict in favor of the plaintiff

above named Freda Daly, as administratrix of the estate of Stewart Daly, deceased, and against the defendant above-named Swift & Company, a corporation, and do assess the plaintiff's damages in the sum of ($5,000.00) Five Thousand Dollars.

M. A. FULMORE,
Foreman."

WHEREFORE, by reason of the law and the premises and the verdict of the jury as aforesaid, it is ORDERED, DECREED AND ADJUDGED and this does ORDER, DECREE AND ADJUDGE, that Freda Daly, as administratrix of the estate of Stewart Daly, deceased, do have and recover of and from Swift & Company, a corporation, the defendant above named, the sum of Five Thousand ($5,000.00) Dollars, together with interest thereon from the 24th day of [22] December, 1929, at the rate of eight per cent per annum, and for her costs of suit hereby taxed at the sum of Forty-six and 20/100 Dollars, and that such sum bear like interest.

Dated and entered this 24th day of December, 1929.

C. R. GARLOW,
Clerk.
By L. R. Polglase,
Deputy Clerk.

THEREAFTER, on January 13, 1930, petition for new trial was filed herein in the words and figures following, to wit: [23]

[Title of Court and Cause.]

PETITION FOR A NEW TRIAL.

The defendant in the above-entitled action respectfully petitions the Court for a new trial in said cause upon the following grounds and for the following causes, each of which materially affects the substantial rights of the defendant:

I.

Errors at law occurring at the trial as follows:

1. The Court erred in overruling the demurrer to the complaint.

2. The complaint does not state facts sufficient to constitute a cause of action.

3. The Court erred in denying the motion for a nonsuit.

II.

Insufficiency of the evidence to justify the verdict.

In this connection the petitioner sets forth the following particulars wherein the evidence is claimed to be insufficient:

1. The negligence of David Mottleson is the efficient, proximate cause of the injury to Stewart Daly, not any negligence of the defendant,—the negligence of Mottleson in operating the elevator and the negligence in so placing the half portion of

the fly-wheel where it could be struck by the elevator; and in employing Stewart Daly, to work at Swift's plant.

2. The evidence fails to show any notice or knowledge on the part of the defendant that Stewart Daly was working on the premises of the defendant.

3. The evidence fails to show that the defendant permitted Stewart [24] Daly to work on its premises.

4. The evidence fails to show that Stewart Daly was employed by the defendant, but on the contrary shows that Stewart Daly was employed by David Mottleson, an independent contractor, to do the work of David Mottleson.

5. The evidence of the plaintiff shows contributory negligence on the part of Stewart Daly in putting himself in close proximity to the fly-wheel, which he was not assisting to move, which contributory evidence was not explained away by the plaintiff.

6. The evidence shows that David Mottleson is the one guilty of negligence *per se,* in that he is the one who employed Stewart Daly to work, that Mottleson is the one who violated the statute, and is the prime or first mover in a course of events which led to the injury of Stewart Daly.

The petition for a new trial is made and based upon the pleadings and papers on file, and upon the minutes of the court in said cause, including instructions given, and proceedings had, and testimony taken in said trial of said cause, which pro-

ceedings are embodied in a bill of exceptions heretofore presented for settlement.

JOHN K. CLAXTON,
A. C. McDANIEL,
Attorneys for Defendant.

Service of the foregoing petition acknowledged and copy received January 13th, 1930.

MAURY, BROWN & MAURY,
LOWNDES MAURY,
R. LEWIS BROWN,
Attorneys for Plaintiff.

Filed Jan. 13, 1930.

THEREAFTER, on January 24, 1930, minute entry on order denying petition for new trial was duly entered herein in the words and figures following, to wit: [25]

[Title of Court and Cause.]

MINUTES OF COURT—JANUARY 24, 1930—
ORDER DENYING PETITION FOR NEW TRIAL.

This cause heretofore submitted to the Court on defendant's petition for a new trial came on regularly at this time for decision. Thereupon, after due consideration, Court ordered that the petition be and is denied.

Thereupon, bill of exceptions as presented was signed and ordered filed.

Entered in open court January 24, 1930.

C. R. GARLOW,
Clerk.

THEREAFTER, on January 24, 1930, bill of exceptions was duly filed herein in the words and figures following, to wit: [26]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED, That this cause came on regularly for trial before the Honorable George M. Bourquin, Judge of the District Court of the United States for the District of Montana, sitting with a jury, on the 23d day of December, A. D. 1929, Messrs. Maury & Brown appearing as counsel for the plaintiff and John K. Claxton and A. C. McDaniel appearing as counsel for the defendant; and that the following proceedings were had, orders and exceptions hereinafter appearing, had and taken therein, the following being all of the testimony and evidence offered or introduced on the trial of this cause, to wit: [27]

TESTIMONY OF FRANK J. WILLIAMS, FOR PLAINTIFF.

FRANK J. WILLIAMS, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. BROWN.)

The WITNESS.—My name is Frank J. Williams; live at 720 West Granite Street, Butte, Montana; am a physician and surgeon by profession, a graduate of the Chicago College of Medicine and Surgery.

Mr. CLAXTON.—We will admit the qualifications of the doctor.

The WITNESS.—I knew Stewart Daly in his lifetime; on or about the 24th day of August, 1928, I received a call to go to St. James Hospital to attend him, and went there. I found a bone fractured, that means open to the air, of the left ankle, and a large laceration, about six inches long,—laceration means a cut, on the lower ankle, tearing the sole of the foot away from the bone; there was a smaller cut on the outside of the ankle; he was given ether and I cleansed the wounds in the usual manner, sutured them, and had him removed to Room 324; he remained in the hospital for four days. He came out of the anesthetic very nicely and seemed to be doing well the following day; the second day there was a good deal of swelling at and

(Testimony of Frank J. Williams.)

about the ankle and foot, and his condition generally was not so good; and the third day he had discoloration of the toes, and swelling quite a little above the ankle, and there was a peculiar symptom under the skin, showing that he had developed gas bacilli infection. I removed the stitches and applied chlorine solution, which was used a great deal during the war for this particular infection, but the infection continued to progress, the boy became very low; I decided the thing [28] to do was to amputate the leg in order to endeavor to stop the infection; I did an amputation of his leg, the upper third of the thigh, on the 28th of August; I found that the infection which caused the gas in the stitches, and which is usually fatal and very rapidly so, had extended up to the place where I amputated; the boy went into shock, that means that his condition was very bad or near collapse, during the operation, and we removed him to his room in the hospital, and he died a few hours afterwards. He died August 28th, 1928. The cause of death was infection by gas forming bacilli; the infection was caused by an injury to his left foot and ankle. During the time I treated him in the hospital and to his death he suffered a great deal of pain; it was a crushing injury caused by some object, by some weight falling on him, by some object with great momentum.

Cross-examination.

(By Mr. CLAXTON.)

The WITNESS.—The shock was caused by low

(Testimony of David Mottleson.)

vitality caused by the absorption of toxins or poisons of gas bacilli infection. The manipulation of the limb had something to do with it. He never recovered from the effects of that shock.

Witness excused. [29]

TESTIMONY OF DAVID MOTTLESON, FOR PLAINTIFF.

DAVID MOTTLESON, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. BROWN.)

The WITNESS.—My name is David Mottleson; I reside in Butte, Montana; have lived here 25 years. My business in August, 1928, was buying junk. I was acquainted with Stewart Daly in his lifetime. I know the plaintiff, Freda Daly; I have known the family since 1921. I am acquainted with Swift & Company, their premises and place of business at 724 South Arizona Street in Butte, Montana. I was on those premises on or about the 20th day of August, 1928. I bought some machinery in this ice plant from Mr. Jones, representing the York Ice Machine Company. I paid $15.00 for it. I went to Swift & Company's plant to move it, take it out of there. It required dismantling before it could be removed. It was part of my agreement with the York Ice Machine Company

(Testimony of David Mottleson.)

that I should remove it from Swift & Company's plant; I bought it there in the basement. I know Mr. Young; I don't know whether he was superintendent or foreman, anyway he was the head man there, at Swift & Company. I did not have any conversation with Mr. Young relative to the removing of this old ice plant or the manner in which it was to be removed. Mr. Jones and I had the orders to take it out of there; Mr. Young was there when I had a conversation with Mr. Jones about taking out of this machinery, but he didn't say anything about taking it out. I had Oscar Hedman assisting me there in taking that machinery out, and this Stewart Daly, he brought the tools, whenever we needed any tools, he would help us around. He was in the basement all [30] the time. The ice machine plant was in the northeast part of the basement. I was to move this machinery the best way out which was through the elevator. There was no other way in which I could have removed it. There was a fly-wheel, which we took apart, it come apart in two pieces, and half of the fly-wheel weighed just about 1150 pounds. We moved this fly-wheel by running it out of there with chain blocks, turned it over on the flat side, pushed it toward the elevator; the floor was rather greasy, we couldn't get it on a skid because there wasn't space enough; we couldn't get it up to the elevator on a skid, so we moved it to the elevator, and landed it up in the elevator. Oscar Hedman assisted me in moving this half fly-wheel from the plant that we

(Testimony of David Mottleson.)

dismantled to the elevator. Stewart Daly was in and around the basement at that time; he handed us tools whenever we needed them. They said I could have the elevator whenever I needed it. By "they" I mean any of the men, Mr. Young and any of the men that were down in the basement, told me that I could have the elevator when it wasn't in use. They told me that a certain man there was to run the elevator for me, but at the time this man was in what they call the big box or big vat, where he was salting down or fixing up meat,—he had different clothes on, and as I had used the elevator the previous day, so I just went along and let the elevator down. I did that myself. No instructions were given me by Mr. Young as to how to use this elevator. I had used elevators before in different places. There was room for this elevator to drop beneath the level of the basement floor; there is a sump in every elevator; this one had about a foot or sixteen inches. The elevator wouldn't stop exactly on the floor; it would stop a little bit below. We had already moved a portion of this fly-wheel out [31] of there; we had moved part of the base and one-half of the fly-wheel and some of the bearings. This man that operated the elevator for us the day before released some band or pulled some back and lowered the elevator below the floor. I do not know whether the elevator could have been brought beneath the level of the floor unless there had been some change made or alteration made in the band; they worked some kind of belt or some-

(Testimony of David Mottleson.)

thing in back there where the cable was on to lower get the machinery on.

it. They did that at my request so that we could

As to the method in which we placed this half fly-wheel or intended to place it on the elevator, we had the fly-wheel on the face, the half fly-wheel on the face, and close to the elevator, and when I moved the elevator; I first let it down and then I moved the elevator up, and when it come up, it went up with such a jerk that I couldn't stop it; the part which touched this wheel, the wheel fell over on the side, and it was half of the wheel on a corner, right there, the corner, which hit the floor, the wheel hit the floor and kind of bounced up, because being kind of half circle, jumped up, and then when it come down again it hit the boy on the foot.

We could not get the wheel in the elevator by laying it flat on the floor. I did not suggest any other method of taking that wheel up by the use of the elevator to Mr. Young or any other foreman of Swift & Company; we decided that that would be the best way to get it out. I did not say anything to Mr. Young or any foreman of Swift & Company that I desired to raise the elevator up in the shaft and attach the fly-wheel to the bottom of the elevator and raise it that way. I talked that over with someone on the outside; I didn't talk that over [32] with any of the employees of Swift & Company.

(Testimony of David Mottleson.)

Stewart Daly was on the premises of Swift & Company from Monday until Friday, and we took out the balance on Friday afternoon after the accident. On Monday we were there half a day; we were there about 3½ hours on Monday, and every day after that, on Tuesday, Wednesday and Thursday we were there approximately 7½ hours a day.

Mr. Young, the manager of Swift & Company, was down in the basement while we were at work on two afternoons, just for a short period. Stewart Daly was there at the time. Mr. Young did not have any conversation with me during those times directly. I could not say whether or not this boy was around and within view of Mr. Young while he was there. He was there on the floor. There were men on that basement floor while Stewart Daly was there; I could not say whether they were foremen or not; they were workmen; I could not say they knew the boy was there; there was one particular man that was fixing up meats there, he and the boy were joshing each other. As to there being a foreman down there directing the work of the men, we were engaged taking this wheel apart, and we had to look to the wheel; we couldn't look all over the basement at the same time.

The basement was lit up; there are electric lights there. It was lit all the time we were down there.

Cross-examination.

(By Mr. CLAXTON.)

The WITNESS.—I think I bought the machinery

(Testimony of David Mottleson.)

on a Friday or Thursday preceding the Monday that I started to work. Stewart Daly worked for me a long time, but not in the basement; when I bought the machinery. He worked for me just during the school vacation, the summer vacation of that year. The [33] year previous he did a few errands for me, but he did not work steady. He had worked for me practically steady the summer that I moved the machinery from the Swift basement. I obtained permission from Mrs. Daly for his employment; his father knew he was helping me. I have known the family since 1921.

As to the conversation I had with Mr. Jones relative to this machinery, I first came down and looked over the place and told him that I would give him $15.00 for it, because there was quite a bit of work taking it out. They asked more money for it; they wouldn't let me have it for that; I mean by "they," Mr. Jones. My transactions so far as this machinery was concerned were entirely with Mr. Jones. I finally bought it from Mr. Jones for $15.00. My agreement was to take it out of there, as quick as I could, I guess.

Mr. Young told me that whenever I would want the elevator that I could have it, that is if it wasn't in use; if they were not using it, and there was one man, they told me that he would run the elevator for me. That was the man that was in the basement. I do not know his name. He operated the elevator a few times the day previous, and I did also. I never moved the elevator up with a load;

(Testimony of David Mottleson.)

I merely operated it in placing it on the floor. I saw this man when he operated it with the use of the belt; that was operating it by hand; I believe that was to lower it, I don't know why it was; I did not pay attention the way it was done, but I saw him do it. After he had fixed it under there then it would drop below the floor. I did not notice anything that connected up. On the morning of this accident I did not call this man to operate the elevator; he was in the vat room taking care of some meats, had slicker and hip boots on, and I had done it the day [34] previous, and so I just naturally undertook to do it myself. The elevator started with a jerk; that was not the normal way; it gave a sudden jerk. I pulled the cable; when I pulled the cable that hit the wheel more. I had had experience with elevators. I used to work for Zimmerman Furniture Store down here years ago, that belongs to Baxter now; they had an elevator in there; I worked in there for 13 months, and I worked in St. Paul for several concerns that had elevators of the same type. I had never operated the elevator in Swift's prior to this occasion. The operation of the elevator is handled by the cable, the way you handle the cable; if you throw it in immediately into full contact the full power is on.

Mr. Young told me not to operate the elevator but to call this man on the floor.

(Testimony of David Mottleson.)

Redirect Examination.

(By Mr. MAURY.)

The WITNESS.—The office was in the main floor of the building. When we went to work to get down into the basement we would have to pass the office. You would come into the door here and go this way; whether they would see you or not I couldn't say, but you would pass diagonally past the office. The three of us passed with our tools and working clothes on right by this office. When we would come out at noon we would come right by the same way. I did not notice whether Young was in there at those times. I first became acquainted with Young in the basement of Swift & Company's plant. Stewart was in the basement, but the basement is practically as large as this room. I think Young was there two afternoons that I and the boy were down there. Young wasn't there the day that the child was injured. [35]

Recross-examination.

(By Mr. CLAXTON.)

The WITNESS.—I do not know whether Mr. Young saw Stewart Daly in the basement.

Witness excused. [36]

TESTIMONY OF FREDA DALY, FOR PLAINTIFF.

FREDA DALY, the plaintiff, called as a witness, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. BROWN.)

The WITNESS.—My name is Freda Daly; I am the plaintiff in this action. I am the mother of Stewart Daly; I can't recall when he was born, but he was 11 years, eight months and 23 days old when he died. I know David Mottleson; have known him quite a few years. That has been an intimate acquaintanceship between him and the family. I did not know at any time between the 20th and the 24th days of August, 1928, that my son, Stewart Daly was working on the premises of Swift & Company. I knew he was with Dave Mottleson, but I never thought he was in Swift's. I did not know it until the day he was up in the hospital. Before he was injured he was healthy and strong. I thought he was just around with Mottleson gathering up junk, you know, just to keep him out of mischief, thought he was safe, in good company, to take good care of him.

Cross-examination.

(By Mr. CLAXTON.)

The WITNESS.—I knew he was working for Mr. Mottleson; he had been working for Mr. Mottle-

(Testimony of Philip Daly.)
son for some little time. I also knew that Mr. Mottleson was engaged in the junk business.

Witness excused. [37]

TESTIMONY OF PHILIP DALY, FOR PLAINTIFF.

PHILIP DALY, called as a witness on behalf of the plaintiff, having been first duly sworn testified as follows:

Direct Examination.

(Br Mr. BROWN.)

The WITNESS.—My name is Phil Daly; Stewart Daly was my son. I know David Mottleson; have known him eight or ten years. I did not know at any time between the 20th of August, 1928, and the 24th day of August, 1928, that my son was working on the premises of Swift & Company. I knew he was working with Dave Mottleson, I didn't know where; that might be anywhere, Anaconda or Deer Lodge or Philipsburg, I couldn't tell; I couldn't know where he would be at; I knew he was along with him, Mottleson.

The WITNESS.—The boy was a big, husky boy prior to the 20th of August. The scale of wages for common laborers above the age of 21 years of age on the 20th and 24th days of August, 1928, was about $5.00 a day. The prevailing scale at this time I believe down town is $5.25, I am not sure.

(Testimony of Philip Daly.)

Cross-examination.

(By Mr. CLAXTON.)

The WITNESS.—It varies from time to time. I knew that my son was along with Mr. Mottleson, and that Mottleson was in the junk business. I did not know where Mottleson was working at that time; I did not inquire. My son had been working for Mottleson for some little time, during school vacation; he was always wanting to earn a dollar for himself so he would have some money in the bank; he had in the neighborhood I believe of ten dollars in the bank. I did not object to my son working for Mottleson; as long as he was a producer; I thought Mottleson was all right, and he used him all right; he would keep him out of mischief, as long as he was with Mottleson. [38]

Redirect Examination.

(By Mr. BROWN.)

The WITNESS.—Any money that was paid by Mottleson for the labor of my son was paid to the boy. I never received a cent.

Witness excused. [39]

TESTIMONY OF J. COPPO, FOR PLAINTIFF.

J. COPPO, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. BROWN.)

The WITNESS.—My name is J. Coppo; I live

(Testimony of J. Coppo.)

at 431 South Idaho, in Butte; have lived here 37 years; I am a ropeman on the hill, have followed that occupation 6 years. The duties of a ropeman are to handle all heavy machinery; those are my duties, moving heavy weights; I am familiar with that class of work. In the course of my work I have moved a half of a fly-wheel of the weight of 1150 pounds. The safe and proper method of moving that kind of wheel is to have chains on boats, put it on a two-inch plank, put some rollers on it and roll it; lay it down flat, why a couple or three men on it, would be required; it all depends; of course if you stand it up on end, why have to have maybe two or three men to steady it, maybe have another man to pull it wherever it is going to. I heard the testimony of Mr. Mottleson as to the way that he moved this fly-wheel. With that method the number of men required would be one man on the side of the chain blocks, and one man pulling on the chain blocks; maybe two or three men to steady his fly-wheel; it would take three or four men anyway, not less than that.

Cross-examination.

(By Mr. CLAXTON.)

The WITNESS.—If the chain blocks were securely fastened about the wheel that would not of itself steady the wheel. We generally have three or four men to steady it; sometimes as high as five or six men. I work for the Anaconda Company; we don't do it with laborers. There are three of

(Testimony of J. Coppo.)

us; we don't [40] have laborers, we have skilled mechanics in that line. I would take into consideration the width of the fly-wheel in steadying it. I know just about the size of a fly-wheel; of course I don't know about this one at Swift & Company's. I know the size of the fly-wheels we handle. It is not a fact that if the fly-wheel were wider the less trouble it is to steady; you have to watch it all the time; the narrower the wheel the more dangerous.

Witness excused. [41]

TESTIMONY OF J. L. VISNER, FOR PLAINTIFF.

J. L. VISNER, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. BROWN.)

The WITNESS.—My name is J. L. Visner; I live at 656 South Dakota, in Butte; have lived here over twenty years; I am a ropeman; have followed that occupation all my life. I am employed by the A. C. M. Company. We move heavy machinery, gallows frames and everything heavy, pipe. In the course of my occupation I have been called upon to move half of a metal iron wheel, fly-wheel, weighing approximately 1125 pounds, and weights of that character. In doing that kind of work it all depends how you move it, generally lift it up

(Testimony of David Mottleson.)
with tackle, or move it on the floor, lay it down on rollers first; lay it down on a boat and rollers.

(Recess.)

Witness excused. [42]

TESTIMONY OF DAVID MOTTLESON, FOR PLAINTIFF (RECALLED).

DAVID MOTTLESON, a witness heretofore called on behalf of plaintiff, recalled for further

Direct Examination.

(By Mr. MAURY.)

The WITNESS.—Stewart Daly was hurt by the fly-wheel hitting him in the foot; the elevator caused it to go over; in falling back after being struck by the elevator it crushed Stewart Daly's foot. It was just a little red; you couldn't see any blood. I took him immediately to the hospital where Dr. Williams treated him.

Cross-examination.

(By Mr. CLAXTON.)

The WITNESS.—The edge of the fly-wheel protruded over the elevator shaft; the rising of the elevator platform struck the edge of the fly-wheel and turned it over.

Another man and I were moving this fly-wheel; we brought it up in the elevator; it lay on its rounded edge; towards the center of it protruded over the elevator shaft; one of the ends protruded

(Testimony of David Mottleson.)

over the shaft. The elevator was below and I pulled something and made it come up; it struck that and lifted it up, fell back, and jumped up again. I could not say which side hit the floor, the right or left side; it hit on the side, tipped over towards the side, bounced up and hit and fell again.

Witness excused.

Mr. MAURY.—We rest.

Mr. McDANIEL.—May it please the Court, reserving the right to put on proof in case the motion is denied, we move the Court to grant a nonsuit in this matter and to dismiss the complaint, upon the grounds and for the reasons there is [43] no sufficient evidence to impose liability upon the part of Swift & Company.

First, The evidence shows that the boy was employed by Mottleson; the complaint alleges and the proof shows that Mottleson was an independent contractor.

Second, That Swift & Company is not required to oversee the servants of other employers; and the case has not been proven within Section 3095 of the Revised Codes of Montana, which says: Any person—"having control or management of employees, or having the power to hire or discharge employees, who shall knowingly employ or permit to be employed any child under the age of sixteen years, to render or perform any service or labor, whether under contract of employment or otherwise"—

Third, Swift & Company were not using the elevator in their business at the time of the accident; and also, the evidence shows that orders had been given that Swift & Company employees should not use the elevator whenever Mottleson wanted to use it; and the evidence shows,—the evidence of Mottleson, in moving the fly-wheel up, it projected into the elevator shaft.

Fourth, The complaint does not state facts sufficient to constitute a cause of action.

(Arguments.) [44]

The COURT.—Gentlemen of the Jury: As you know, before you went out the plaintiff had concluded its case *prima facie* and the defendant moved that the case be nonsuited; in other words, thrown out of court as no case at all; that the proof did not sustain any case in behalf of the plaintiff. The Court has come to the conclusion, as it now stands, the case is one that you ought to decide and the motion for a nonsuit is denied, and the defendant will proceed with its proof. Proceed for the defendant.

Mr. McDANIELS.—We ask an exception.

The COURT.—It will be noted. [45]

TESTIMONY OF T. J. McGINLEY, FOR DEFENDANT.

T. J. McGINLEY, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. CLAXTON.)

The WITNESS.—My name is T. J. McGinley; I am bookkeeper and cashier of Swift & Company, and was such during the month of August, 1928. I recall the removal of the old ice plant from the basement of the plant. Mr. Mottleson removed it. Mr. Mottleson was not employed by anyone; the York Ice Machine Company had sold it. Swift & & Company did not have anything to do with the removal of that machinery from the plant.

I did not know Stewart Daly. I recall the young man who was injured upon the premises. Mr. Daly was not upon the pay-roll of Swift & Company. I am not familiar with the general operation of the elevator used in the plant; never operated it. As such bookkeeper requisitions for repairs would come through our office; I would be apprised of any requisitions for repairs of the elevator; I would execute such orders for repair with the approval of the manager. There were no repairs made to the elevator immediately following the accident.

Q. When were repairs made, if you know?

(Testimony of T. J. McGinley.)

Mr. MAURY.—We object; it was not out of condition, as they denied; there is no need of going into the question of repairs.

The COURT.—Sustained.

Cross-examination.

(By Mr. MAURY.)

The WITNESS.—The manager was W. G. Young at the time of the accident. I do not know, could not state definitely, how long Stewart Daly had worked in the basement there. I had seen [46] the boy just from the office; our office is apart from the other part of the building; and the only time I would see the boy would be when he would pass the office. I only saw him pass our office once; that was when we were moving one-half of that fly-wheel. As I understand it the first half was already removed when the boy was injured and they were working on the second half. I could not say definitely how many days it took to remove the first half of the fly-wheel, unless it was one day, one morning. At the time I saw them moving the first half of the fly-wheel the boy wasn't doing anything; when I saw him he was passing the office window. Evidently he went in and out with Mottleson, but I don't know that. I could not state whether he went down the elevator or walked down the stairs. I could not say exactly how many hours Mottleson worked there a day on the first half of the fly-wheel; and in fact we have no check at all for Mottleson's hours in the office; I did not go around

(Testimony of T. J. McGinley.)

and check the men that worked; I wasn't the timekeeper; the foreman on the floor was that; that is the man on the floor. Mr. McDonald was the foreman in the basement where this fly-wheel was being removed,—Reynolds J. McDonald. He was on shift in the basement from the 20th to the 24th of August, 1928; and on shift all day long. The shift was eight hours. He was in complete control of everything going on in the basement in regard to the manufacturing of meats. They did not dress meat in the basement; they didn't manufacture it, they smoked it; that is all the manufacturing, smoked meats. The shift goes to work and did on the 20, 21, 23 and 24 of August at seven o'clock in the morning, and worked until five o'clock in the afternoon. I believe McDonald was in the basement all that time those four [47] days.

I have a diagram of that basement. This is the diagram of the basement where the old ice machine was being removed from.

(Diagram received in evidence, marked Plaintiff's Exhibit 1.)

Q. Where was the ice machine when Mottleson and the boy and the other man that was here, started to move it?

A. I didn't notice the boy; I thought he was Mottleson's son. I did not know he was Stewart Daly. The old ice plant when they started to move it was right there, where I indicate, and is marked "York Compressor." That is where it was situated when they started to move it. I did not follow

(Testimony of T. J. McGinley.)

the course it took through the basement. The freight elevator was here, and it is marked "Elevator." This is the cooler or refrigerator for meats, indicated by the surrounding lines. They had to go around that to get to the elevator. There was no door in the basement that the old ice machine could have gone through. There was an opening, here is an opening here and there is another opening that doesn't show on this diagram; we have a regular shute. I do not know whether they all know it was going up the elevator; the manager knew it; we were the only ones that would know it unless they told the others. The manager did not release the elevator to Mottleson and tell the other employees that Mottleson could use it. As I understand it specific instructions were given as to the use of that elevator, as to who was to use it. Mr. Young, the manager, gave those instructions. I was not a direct witness to the conversation, but learned of it after the accident. [48]

Mr. Mottleson took the first half of the fly-wheel out of the building. I saw the first half of the fly-wheel go out; Mr. Mottleson was the gentleman I saw handling it; Oscar Hedman was with him, and I saw the boy around there; he was dressed in working clothes, and I thought he was Mottleson's son; I had only seen him once.

I have examined the pay-roll as to who was present during the 20th, 21st, 22d and 23d of August. Mr. Young was there. He was in charge and actually present on the premises on the 20th of August

(Testimony of T. J. McGinley.)

during working hours. I am not sure whether he was there all day on the 21st; he was in and out. I imagine he was in and out on the 22d, in routine business; he has an office, and attending to regular business in the office. I would say the first half of the fly-wheel passed by within ten feet of the door of his office. His office is enclosed in glass. You cannot see the entire building; you can see just a part of the front of the building. You could see the first half of the fly-wheel go out; I had to be in his office to see that.

Redirect Examination.

(By Mr. CLAXTON.)

The WITNESS.—I do not know whether Mr. Young saw that fly-wheel going out or not. Mr. Young is in and out of the plant during the day. Unless there is some business of some kind to be attended to he would not necessarily be in the basement.

Referring to this map I have marked the letter "A" on the map as the location of the new ice-machine. The new ice machine was installed before the old one was removed. The new ice machine was installed in a separate or different part of the [49] building than where the old one was situated. Mr. Young's office is a part of the general office. There is a partition between the office and the outside of the plant where the elevator operates. That partition is made of wood; I would say about four feet is wood, and then there is glass, or a window, about

(Testimony of W. G. Young.)
two feet and a half; for four feet from the floor the partition is wood.

Witness excused. [50]

TESTIMONY OF W. G. YOUNG, FOR DEFENDANT.

W. G. YOUNG, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. CLAXTON.)

The WITNESS.—My name is W. G. Young; I am employed by Swift & Company, and was so doing the month of August, 1928, and in charge of the Butte Branch, manager of the Butte Branch plant. I know Dave Mottleson now, and recall the incident of removing of a certain ice generator or refrigerator. It was removed by Mr. Mottleson. Swift & Company had nothing to do with the removal of that plant. I recall the installation of the new machinery. I first met Mottleson when he came to see Mr. Jones. Mr. Jones was the erecting engineer for the York Ice Machine. I had nothing to do with the sale of the old ice plant. Mr. Jones was in charge of the sale of that plant. I first met or saw Mr. Mottleson when he came into the building and made arrangements with Mr. Jones to buy the old machine; I saw him come in the building. I did not participate in that conference. After he

(Testimony of W. G. Young.)

had a conference with Mr. Jones there was a conversation between Mr. Mottleson and me in regard to the use of the elevator in the Swift plant. Jones approached me and wanted to know if they could use the elevator to raise the machinery from the basement to the main floor, and I told Jones they could provided one of our men operated the elevator. Jones and I then went down in the basement and so instructed Mottleson, to which he agreed. I instructed employees of Swift & Company to operate the elevator for Mr. Mottleson; so instructed Mr. McDonald, who is the smokehouse man in the basement, and Mr. Richards, who is the foreman on the floor. I saw Stewart Daly upon the premises; I don't remember [51] whether that was the second or third day. I did not know that Stewart Daly was employed upon the premises by Mottleson. There was nothing said by Mottleson to indicate in what capacity Stewart Daly was upon the place.

Mr. McDonald is the smokehouse man, and he is located, with reference to his work, in the basement. At that time I was familiar with the operation of the elevator, and had operated it, but did not operate it during that particular week. I did not operate it immediately after the accident occurred, but saw it operated. There were no repairs made upon the elevator immediately after the accident. The elevator was in operating condition. The elevator has an automatic stop in the basement; and will stop automatically on its downward

(Testimony of W. G. Young.)

descent, and when it stops the platform is below the level of the floor. I don't know that I could state the reason why. The plan usually followed in bringing the elevator to the level of the basement floor is by handling a control cable, which is done by pulling up or down on the cable. You can also do it by releasing the weight that controls the cable. I was not present when the elevator was being used at Mr. Mottleson's request.

Cross-examination.

(By Mr. MAURY.)

The WITNESS.—There is no foreman in the basement. Mr. McDonald's duties were as a smoke-house man, which means that he washes and hangs the smoked hams and bacon; on August 20th he had one assistant in the daytime and a night man. I knew that the old ice plant was coming up the elevator. I did not see the first half of the fly-wheel as it went out through the building. On that day I was in the office part of the time and away from the office part of the time. [52]

I first saw Stewart Daly in the basement, which was not a place for customers, but a place for employees; that might have been two or three days before he was hurt.

Richards is the branch house foreman, over the men in the branch house; house foreman, we call him, and that includes the basement.

(Testimony of W. G. Young.)

Redirect Examination.

(By Mr. CLAXTON.)

The WITNESS.—My office is slightly to the front of the elevator shaft, and it is a separate part of the building; is an addition to the building. There is a solid wall on one side, and on the other glass and wood. The bottom half of the division, straight across the building is constructed of wood, for possibly four feet from the floor; the balance of it is constructed of glass for approximately four feet, and then wood for a foot or two.

Recross-examination.

(By Mr. MAURY.)

The WITNESS.—Richards the floorman or floor manager was there on the 20th of August and at work; he was also there on the 21st of August, 1928, and at work; also the 22d and at work, and 23d and at work.

Reredirect Examination.

(By Mr. CLAXTON.)

The WITNESS.—Stewart Daly was not employed by Swift & Company.

Witness excused. [53]

TESTIMONY OF REYNOLDS J. McDONALD, FOR DEFENDANT.

REYNOLDS J. McDONALD, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. McDANIEL.)

The WITNESS.—My name is Reynolds J. McDonald; I am employed by Swift & Company, and specifically my duties there are smokehouse man, smoking *hands* and bacon. I am in no way the superintendent of the basement part of that building.

I saw Stewart Daly around there, but didn't know him at that time; didn't know who he was at that time. I at no time ever gave Stewart Daly any orders, and never heard any man employed by Swift & Company ever give Stewart Daly any orders. I could not state what he was doing, because I didn't pay much attention to him; I thought he was around picking up bolts and the like of that.

I saw all of the machinery hauled up out of the basement. I had instructions from Mr. Young about the operation of that elevator. He said any time the elevator was to be moved that Mr. Mottleson was to get myself or one of the other boys to move it. Mottleson was present at that time and agreed to that. Mr. Mottleson thereafter had called upon me to operate the elevator a few times, but not

(Testimony of Reynolds J. McDonald.)

at that certain time. Nobody else to my knowledge operated the elevator for Mottleson.

To operate this elevator when you are in the basement, there is an endless cable to start and stop it; you pull down to raise it and pull up to lower it. I started the elevator in the basement when it was loaded, and Mr. Richards stopped it above; he would stop it the same way, with the cable.

I remember the last day the fly-wheel was removed, and was [54] in the basement the day before when the other half went up.

Q. Explain to the jury how the elevator comes down and automatically stops.

A. Well, on the cable there is a clamp that fits right around the cable, and then there is an eye-hook on the elevator that slides up and down the rope. You can set this clamp wherever you want the elevator to stop, and when the eye hits it, the clamp, it stops the elevator.

This clamp had been in the same condition as long as I know it.

When the elevator is coming down and automatically stops it goes below the floor of the basement maybe an inch and a half or two inches. The reason for that is that we have a railing on the elevator and a railing in the basement, and we put a bridge on that to run the pieces across, and we have to drop it below to even up the two railings with the bridge put across; that is, we have a railing running along the ceiling of the basement, and also a railing on the top of the elevator, so that in run-

(Testimony of Reynolds J. McDonald.)

ning meats from the smokehouse you can run it from this railing on to the elevator, and the elevator is so adjusted that this railing is on a level with the railing of the basement.

The day before the accident, in moving up the first half of the fly-wheel, I flushed the elevator level with the floor by releasing the brake and turning the fly-wheel by hand, the fly-wheel on the elevator. Mr. Mottleson present. In bringing it up that inch and a half or two inches I didn't use the motor of the elevator. It is hard to move the elevator that short distance with the motor, because the motor is so quick. [55]

While Mr. Mottleson was working there I believe I operated the elevator almost every load, only one or two, and then Mr. Richards operated the rest. I don't know how many loads were taken up. A person who is familiar with that elevator can use the cable and bring it up two inches and stop it level with the floor, but you have to know how to do it. The safest way to do it is to bring it up by the shaft or belt. The elevator was in good condition, and had been in the same condition for a length of time before the accident, and was in the same condition for a length of time after the accident. I did not notice any change in its operation. It was operated the same way after the accident as it was at the time of the accident and before the accident.

Stewart Daly was not allowed to ride on the elevator when there was a load on it. No person rode on the elevator when there was a load on it.

(Testimony of Reynolds J. McDonald.)

Cross-examination.

(By Mr. MAURY.)

The WITNESS.—Myself and Mr. Richards helped take the first half of the fly-wheel up. He is the same Mr. Richards that Mr. Young spoke of. He did not come down to the basement to take the first half of the fly-wheel up by the elevator. I stayed in the basement and he stayed on the first floor. I wasn't right there when they pushed the first half of the fly-wheel on the elevator, but I think they had rollers on it. There was Mr. Mottleson and another man working on it, and the boy was around there. The boy had overalls on. He was around there when the first half of the machine was put on the elevator. I couldn't say what he was [56] doing because I didn't pay any attention. I saw him around there every day that he was there, but couldn't say how many days it was. He may have been there from Monday until Friday. I didn't say I saw him picking up bolts and things, I said I thought that was what he was doing. I don't know what else he could be doing. The bolts and things he would pick up were put in a box and sent up the elevator; there was a box of bolts and other small stuff sent up by the elevator. I suppose they were the bolts that he picked up; I couldn't say that he picked them up.

(Testimony of Reynolds J. McDonald.)

Redirect Examination.

(By Mr. McDANIEL.)

The WITNESS.—I did not see Stewart Daly doing any work in the basement; just saw him around the machine; couldn't say what he was doing.

Witness excused. [57]

TESTIMONY OF F. R. JONES, FOR DEFENDANT.

F. R. JONES, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. CLAXTON.)

The WITNESS.—My name is F. R. Jones; I am erecting engineer for the York Ice Company, and was employed by that concern during the month of August, 1928. I came to Butte about the 17th or 18th of August, 1928, if I recall. I supervised the installation of a new ice machine in the Swift plant. After the new installation was completed I sold the old machine to Mr. Mottleson. Mr. Mottleson came down to the basement of Swift & Company to see me and asked me what I wanted for the machine, and I told him $50.00; he said he thought that was too much, and he said he would give me fifty dollars if I moved it out of the basement. I told him I didn't want anything to do with moving it, that I wanted to sell it right where it

(Testimony of F. R. Jones.)

was setting; so after a few words of conversation why I accepted the $15.00 for the ice machine with the understanding that Mr. Mottleson should remove it from the basement. The old machine was removed from the basement by Mr. Mottleson and some other fellow who was working for him. I told Mr. Mottleson I would help him dismantle the machine, because he didn't understand how to take it apart. I was there when the machine was dismantled. I couldn't tell you the day I left Swift & Company's plant. At the time I left it was all moved, the machinery, except half the fly-wheel and a small part of the base. I left the Swift & Company one day before the accident, that is I was there up until a day previous to the accident; I left the morning of the accident, in fact; they told me the accident happened at 8:15 [58] and I caught the 8:10 train out of Butte. I was working the day previous at the Swift plant.

I recall a conversation between Mr. Mottleson and Mr. Young and myself with reference to the use of the elevator. I asked Mr. Young if I could use the elevator to take the machinery out, and he said we could. So we went to Mottleson and Young told Mottleson that the elevator was there to be used but for him not to use it; that Mr. Young's employees understood how to operate the elevator and whenever it was loaded why one man in the basement would start it and the man on the first floor would stop it.

(Testimony of F. R. Jones.)

I saw the elevator used the day previous to the accident. The elevator was stopped on the basement floor; it would naturally go to the basement; it couldn't go any further. When the elevator would be stopped by the automatic stop it would not stop level with the basement floor; it would stop a little lower than the floor, I would say approximately six inches. I observed the smokehouse man bring the elevator up to the floor level; I don't remember his name; he was on the stand just preceding me. The day previous to the accident I heard Mr. Mottleson request the Swift employees to operate the elevator for him. I observed Stewart Daly around the premises. He was just flunkeying around. I did not hear Mr. Mottleson make any reference to the boy as his boy; I thought the kid was Mottleson's son myself. I didn't know that he was employed by Mottleson. I didn't see him doing any part of the work of moving the machinery; I wouldn't say he did any of it; and didn't see him riding on the elevator. He probably passed by in front of the elevator, like the rest of us did, but he did not attempt to operate it to my knowledge. [59]

Cross-examination.

(By Mr. MAURY.)

The WITNESS.—When he passed by in front of the elevator he was walking. I don't know that he picked up bolts and small pieces of machinery.

I was in Swift & Company's for three weeks, in-

(Testimony of F. R. Jones.)

stalling the new machinery. They got rid of the old machinery because they installed a new one, and they didn't want the old one in the basement any more; it was in the way. I had no right to store the old machinery there any length of time; my contract was to get the old stuff out of there, but there was no time specified.

This conversation with Mr. Young about using the elevator was in the basement, at a time when Mr. Mottleson and Mr. Young were together, and then after Young had told Mottleson not to use the elevator, he went to his employees and told them to run it in case Mottleson asked him to when the elevator was loaded. There was no other party, no other man or boy there when that conversation took place. There was another man working there with Mr. Mottleson in the basement; but he wasn't there at that time. After this arrangement was made with Mr. Young I told Mr. Mottleson I would help him to dismantle it, and was helping him to dismantle it three days. I don't know where the boy Stewart Daly was all of that time. He was in the basement part of the time during working hours, but don't know how many hours a day. He was not there continuously with Mr. Mottleson. He had overalls on; I thought he was Mr. Mottleson's son. I don't know what Mr. Mottleson called the boy; I didn't call him anything.

(Testimony of Walter J. Richards.)

Redirect Examination.

(By Mr. CLAXTON.)

The WITNESS.—I had no occasion to say anything to the boy. York did not have anything to do with the removal of the old ice machine.

Witness excused. [60]

TESTIMONY OF WALTER J. RICHARDS, FOR DEFENDANT.

WALTER J. RICHARDS, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. CLAXTON.)

The WITNESS.—My name is Walter J. Richards; I am foreman of Swift & Company, down at Swift & Company's plant on Arizona Street in the city of Butte, and have been employed at the Butte branch six years, and was so employed there during the month of August, 1928. I recall the removal of the old ice machine from the basement of the Swift plant. I heard Mr. Young give instructions to Mr. Mottleson as to the use of the elevator. Mr. Mottleson removed the old ice machine. Mr. Young told Mr. Mottleson any time he wanted to move the elevator to call one of his, Mr. Young's boys, on the floor, or the cellar man, to move the elevator. I recall the elevator being used the day previous to the occurrence of this accident for the removal of part

(Testimony of Walter J. Richards.)

of the ice machine. On this occasion Mr. McDonald started the elevator and I stopped it on the first floor. Mr. McDonald works for Swift & Company in the cellar, in the smokehouse department. In starting the elevator Mr. McDonald pulled the cable and I stopped it on the first floor, by pulling the cable. I never saw Mottleson operate the elevator at any time during the previous day, or at any time. I operated the elevator in the course of my work, and was operating the elevator at that time in the course of my work, and had operated it previously to the day of the occurrence of this accident, and operated it immediately following. The elevator was in a proper working condition. When the elevator is lowered to the basement it will stop automatically. When the automatic [61] stop is used the elevator does not stop level with the basement floor, but drops a little lower than the basement floor. The reason it drops lower is we hoist the smoked meats on trailers, and we have a little piece of rail put across to run the smoked meats onto the elevator, and it has got to drop a little lower in order to make a good connection for the rail. That is handled by an overhead track. There is a switch or connection between the overhead track in the basement and the track upon the upper part of the elevator; we have to put a six-inch bridge across there, and that is a joint. The elevator is so regulated that when it stops the track is level regardless of the floor. Sometimes I have had occasion to bring the elevator to the level of

(Testimony of Walter J. Richards.)

the floor. To bring it from the point where it stops automatically to level with the basement floor you just take the cable, and you have got to kind of give it a little short jerk, or if you have anything heavy you release the brake on the motor, and just raise it by hand. It requires experience to operate it by the cable.

I was at the plant on the morning of this accident but was not called upon to operate the elevator on that occasion for Mr. Mottleson. I was upon the floor at the time, and did not hear anyone ask or request to operate the elevator on that occasion.

I did not know Stewart Daly. I was under the impression he was Mr. Mottleson's boy, but did not hear Mr. Mottleson say anything which would indicate that, but formed my idea from the fact that he was around there. I don't know that he was employed by Mr. Mottleson.

Cross-examination.

(By Mr. BROWN.) [62]

The WITNESS.—I saw the boy picking up bolts and helping Mr. Mottleson around there, handing the men tools, wrenches, picking up bolts and bolt heads. When Mr. Mottleson started to dismantle the ice machine the boy was there, and was there all the time Mottleson was on the floor, until the boy was injured.

This elevator has been so fixed by Swift & Company that it stops automatically a few inches below the level of the floor down in the basement. You

(Testimony of Walter J. Richards.)

can bring the elevator up with the cable, or by leaving the brake off and raising it by hand. The hand method is the safest method to use if you have anything that you just want to raise it an inch or so; for a person who has not had any experience with it it is better to raise it by hand; it takes experience, anybody with experience and working there can raise it with the cable.

I never told Mr. Mottleson that in raising this elevator from below the floor level that he should use the hand operation rather than the rope operation. I did not hear Mr. Young or Mr. McDonald or any other man tell Mr. Mottleson that in raising the elevator up to the floor level he could raise it by the hand operation. Mr. Mottleson was not supposed to touch the elevator. He was not given any instruction.

Redirect Examination.

(By Mr. CLAXTON.)

The WITNESS.—I imagine the old ice machine from the point where it was dismantled to the elevator was about 30 or 35 feet. The work of dismantling was done at the location of the old plant, and none of that work was done at or near the elevator shaft.

Witness excused. [63]

TESTIMONY OF OSCAR HEDMAN, FOR DEFENDANT.

OSCAR HEDMAN, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. CLAXTON.)

The WITNESS.—My name is Oscar Hedman. I recall the removal of an ice machine from the basement of Swift & Company plant in this city, and assisted Mr. Mottleson in the removal of that machine. Mr. Dave Mottleson employed me. I was present in the basement when this accident occurred; at that time I was holding the fly-wheel, and Dave raised up the elevator, and as soon as he raised it up the fly-wheel fell over, which must have been caused from the elevator touching it; it was close to the elevator, the fly-wheel. The edge of the fly-wheel was protruding over the elevator shaft. I knew the little fellow that was injured, Stewart Daly. I don't know what he was doing; he was in behind, and I didn't see it at all, because I stayed by the fly-wheel where the elevator is, and when I come over he was lying about three or four feet ahead of the elevator there, and he was hollering, and so Dave carried him upstairs and took him to the hospital.

The old ice machine that we removed or took apart was further down; it was dismantled about

(Testimony of Oscar Hedman.)

ten or fifteen feet, I think, from the elevator shaft and to one side of the basement. I did not see the boys who were working for Swift operating the elevator the day before the accident.

Cross-examination.

(By Mr. BROWN.)

The WITNESS.—I got acquainted with the boy, Stewart Daly, the day before; he was helping Mr. Mottleson in taking this plant to pieces; he was picking up bolts like, and handing us [64] tools to work with. He wasn't around there all the time I and Mr. Mottleson were there, but was there some of the time. I live at 448 Ohio.

Witness excused. [65]

TESTIMONY OF DAVID MOTTLESON, FOR DEFENDANT.

DAVID MOTTLESON, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. McDANIEL.)

The WITNESS.—I am the same Mr. Mottleson who was on the stand this morning. When Stewart Daly was hurt I took him to the hospital.

Q. Did you make any arrangements with the hospital for his care and treatment? A. Yes, sir.

(Testimony of David Mottleson.)

Mr. MAURY.—Objected to as not relevant or material in this case.

The COURT.—Sustained.

The WITNESS.—When I removed this fly-wheel up to the elevator it projected over into the elevator shaft about two inches. Mr. Hedman and myself did the moving.

Witness excused.

Mr. CLAXTON.—That is all.

The COURT.—Anything further for the plaintiff?

Mr. MAURY.—We rest.

The COURT.—Proceed with the arguments.

Mr. MAURY.—(At the end of the argument.) And now, having argued the measure of damages in this case, I submit that your Honor should instruct the jury peremptorily to find a verdict for the plaintiff in this case.

The COURT.—Now, Gentlemen of the Jury, having heard the evidence and the argument, it is now for the Court to instruct you in the law, and in the light of that law you will determine [66] the facts in the case. Remember this is what is termed a civil action. All those heretofore tried by you were criminal actions. The great distinction between criminal and civil actions is this: in criminal actions the plaintiff, the Government, cannot recover unless the guilt of the defendant is proven and the liability of the defendant proven beyond a reasonable doubt; but in a civil action the plaintiff can recover when he can prove his action

by the greater weight of evidence, that is a less degree of proof than beyond a reasonable doubt, as will instantly occur to you.

So in this case the plaintiff must prove her case by the greater weight of the evidence or the defendant will be entitled to a verdict. I am going to make it brief, because the case has take such a turn, that only brief, limited and plain instructions are necessary.

The case is brought under a statute, because while there is some negligence on the part of the defendant alleged in the complaint, apart from violation of the statute, the Court is free to say that none is proven other than violation of the statute. The statute provides—the statute of this State, Montana, provides that the employment of children under sixteen years in certain occupations is prohibited, and then it goes on to state what those occupations are and says, that any person, company or corporation, or any agent, officer or foreman having the control or management of employees, or having the power to hire or discharge employees, who shall knowingly employ or permit to be employed any child under the age of sixteen years, to render or perform any service or labor, whether under contract of employment or otherwise—that would be whether for pay or gratuituously—in or about any mine, mill, [67] smelter, factory—which is the important one here—workshop or factory, or in or about any passenger or freight elevator shall be guilty of a misdemeanor and punishable as in the statute provided. In other words, the

state would prosecute them for having violated this statute and they would be punished by certain penalties of fine or imprisonment; a person would be imprisoned, a corporation cannot be imprisoned, has no personality. The Court will tell you and state to you and instruct you that this case comes within that statute. This boy was apparently less than twelve years old, and he was employed in a workshop or factory, a place where fresh meats were converted into smoked and salt meats, apparently from the testimony before you, and apparently at the time he was killed he was employed to perform services in, on or about any freight elevator—he was about the freight elevator helping, you will remember, Mottleson to get rid of this fly-wheel and get it out of the premises.

There were charges that the elevator was defective. There is no proof that this elevator was defective; the elevator, so far as Swift & Company is concerned was in proper condition, reasonably safe to work. The real cause of the injury, after you take into account the fact that Swift & Company permitted the boy to be employed there, was negligence, disobedience of orders by Mottleson himself trying to run the elevator with which he had had no experience. But the law says that an employer who allows a boy to work there is guilty of negligence by that fact. He undertakes the duty, which the law imposes upon him, to see to it that to his knowledge no boy under that age is allowed to perform any service in, on or about his workshop or factory, or in, on or about his freight elevator. [68]

This law, of course, was established for a good purpose, which is to protect the young under sixteen who, as the saying is, are the seed corn for the next generation. Society is interested in perpetuating the race, of course; every member of society is, and to perpetuate the race in a healthy, strong, proper condition, and this is one way that society aims to reach it, by forbidding the employment of children in a place where they are likely to suffer in their health or in their limbs or in their morals. It goes on to say anyone who puts them in an immoral place, shall be equally guilty. So, Gentlemen of the Jury, it would seem from all of the evidence in this case that this boy, by the joint violation of duty on the part of Mottleson, who himself employed him, took him in that place, and who was primarily responsible and culpable in that the boy was injured by the elevator, and the defendant Swift & Company, who knew that he was being employed there, knew it through Richards,—Richards says he was the foreman,—which the law mentions, Richards says he had seen the boy there, picking up bolts, and helping Mottleson with tools and the like for several days. That is what the law says he knows, if the boy was employed there, then the superior, the corporation who employs that foreman is liable for whatever damages occurred, if that employment contributed to the injury to the boy, as apparently it has done in this case; if they had not allowed the boy to work there he never would have been injured by that elevator. So the Court will state to you, as requested by counsel for the plaintiff, the plain-

tiff, the administratrix for the deceased boy is entitled to recover.

Then the question will be for you, what damages ought to be awarded to compensate the boy, in the theory of law for the injuries that were inflicted upon him. He was about eleven [69] and three-quarters years old. The evidence is he was a husky boy, and apparently a boy that was helpful and willing to work, at least he was working on that occasion, with the consent of his father, no doubt, and apparently satisfactory to Mottleson.

He had a life expectancy, of which we take judicial notice of, oh, somewhere around 45 years. Life expectancy means that those who are interested in statistics of length of life, by taking persons in hundreds of thousands and averaging their life from childhood to old age, have discovered that the average person when born of this age, has a life expectancy of somewhere around 45 years. A person at birth has an average expectancy of around 57 years. Now, mind, we don't all live that long; some of us live longer; but that is how the average is arrived at. So this boy while he had an expectancy around 45 years,—the mortality tables are not in evidence, and I don't remember them offhand,—while he had an expectancy of 45 years he might not have lived that long; he might have died really before he ever reached 21, or might have lived much longer; but it is on what you consider the likelihood and reasonable probability that you finally base judgment in the case and the damage that the deceased's representative in this action now is entitled to recover,

or as to what would be a fair, reasonable compensation for the suffering that was imposed upon the boy by the injury that he received at that elevator during the time that he lived, some three or four days; he was injured on the 24th and the doctor says that he died on the 28th, living something like four days, and for that pain and suffering you are entitled and should make a reasonable compensation in money. Now of course there is no exact measure in money for the pain and suffering that the boy endured, and therefore it is left to the honest judgment of 12 men to [70] allow such reasonable amount as in their judgment is just.

In addition to that the representative of the deceased is entitled to recover whatever he would probably have earned after he arrived at the age of 21, if he arrived at that age. You see until he was 21 his father is entitled to his earnings, and this suit is not in behalf of his father or mother; it is in behalf of the boy himself, in the theory of the law, represented before you by the administratrix. So it will be for you to say what is reasonably probable of the boy having earned any particular amount of money, having lived to 21, how much longer it is reasonably likely he would live, and what would be his earnings during that period of time; counsel for the plaintiff has said, less what it would probably *would* have cost him to live. And of course when you come to estimate the amount of his earnings, you have to arrive at some opinion that he would live a certain length of time after 21, or some time; and that he would earn money; you would have to

consider whether he would work every day, what he would work at, what he would probably earn; there can be no exact standard, it is left to be measured by the sound judgment of 12 men; there is no other way to get at it. We cannot say what this boy would have done, whether he would have risen to some great height above common labor, whether he would have limited himself to common labor, or whether he would have turned out an idler. Of course the theory of the law is that he would have lived to his expectancy and that he would have worked and earned money, but it is for the jury to say how long they think he would have lived; what they think he would have earned, what they ought to allow as reasonable compensation for the loss of earnings which the [71] boy you may find would have earned. That is the only way it can be arrived at, the honest judgment of 12 men.

Well, that is all the case, Gentlemen of the Jury; leaves it only to determine the amount of money for pain and suffering and for the loss of earnings which the boy in your judgment might have received and secured during whatever time you believe he would have lived after he was 21 years of age.

When you retire to the jury-room select one of your number foreman and proceed to a verdict. It takes 12 to agree upon any verdict in this case. Any exceptions for the plaintiff?

Mr. MAURY.—No, sir.

The COURT.—Any for the defendant?

Thereupon the jury retired to consider of their verdict, and subsequently returned into court their

verdict in favor of the plaintiff and against the defendant, which said verdict is in words and figures as follows:

(Title of Court and Cause.)

VERDICT.

We, the jury in the above-entitled cause, do find our verdict in favor of the plaintiff above named, Freda Daly, as administratrix of the estate of Stewart Daly, deceased, and against the defendant above named, Swift & Company, a corporation, and do assess the plaintiff's damage in the sum of Five Thousand (5,000.00) Dollars.

M. A. FULMORE,
Foreman. [72]

BE IT FURTHER REMEMBERED, That thereafter and upon said 23d day of December, A. D. 1929, the Court duly made its order in said cause, and ordered the same entered upon the minutes of said court, as follows:

(Title of Court and Cause.)

"Thereupon, on motion of J. K. Claxton, Esq., the Court ordered that defendant be granted 20 days' additional for bill of exceptions herein."

And now, within the time allowed by law and as granted by the Court the defendant presents this its proposed bill of exceptions and asks that the same may be signed, settled and allowed as true and correct.

Dated this 8th day of January, A. D. 1930.

JOHN K. CLAXTON,
A. C. McDANIEL,
Attorneys for Defendant.

Service of the foregoing bill of exceptions, by acceptance of a true copy thereof is acknowledged on this 8th day of January, A. D. 1930.

R. LEWIS BROWN,
LOWNDES MAURY,
Attorneys for Plaintiff. [73]

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

The undersigned, the Judge who tried the above-entitled cause, hereby certifies that the above and foregoing, by him corrected, is a full, true and correct bill of exceptions in said cause, and contains all evidence introduced, proceedings had and exceptions taken at the trial of said cause, and the same is accordingly signed, settled and allowed and ordered filed this 24th day of January, 1930.

BOURQUIN,
Judge.

Filed Jan. 24, 1930.

THEREAFTER, on March 7th, 1930, petition for appeal was duly filed herein in the words and figures following, to wit: [74]

[Title of Court and Cause.]

PETITION FOR APPEAL.

The defendant above named petitions this Court for an appeal herein, and respectfully shows:

1.

That this is an action for damages for death alleged to have resulted to *D*tewart Daly, deceased, on the 28th day of August, 1928, the injury being alleged to have occurred on the 24th day of August, 1928, at which time he is alleged to have been unlawfully permitted by the defendant to work upon its premises in Butte, Montana, and it being alleged that said death was due to the negligence of the defendant. The said action came regularly on for trial before the court sitting with a jury. After the introduction of evidence, the argument of counsel and the instructions of the Court, the jury returned its verdict in favor of the plaintiff and against the defendant, and judgment upon said verdict was entered in the said action on the 24th day of December, 1929, for the sum of five thousand dollars, together with plaintiff's costs.

2.

That the above-named defendant, Swift & Company, a corporation, feeling aggrieved by the said judgment and the proceedings had prior thereto in this action, desires to appeal from said judgment to the Circuit Court of Appeals, and the reasons

for its said appeal are set forth in its assignment of errors filed herewith, all of which errors were committed in said cause to the prejudice of the defendant.

Wherefore, the defendant prays that its appeal be allowed to the United *States Court* of Appeals, for the Ninth Circuit, for the correction [75] of said errors so complained of, and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said judgment was based and rendered duly authenticated, be sent to the said Circuit Court of Appeals under the rules of said court in such case made and provided.

Petitioner prays that such appeal shall operate as a stay of proceedings under said judgment on the defendant furnishing a bond in such amount as the Court may direct for such purpose according to law, and that said cause may be reviewed and determined and said judgment, and every part thereof, reversed, set aside and held for naught; and for such further relief or remedy in the premises as the Court may deem appropriate.

JOHN K. CLAXTON,
A. C. McDANIEL,
Attorneys for Defendant.

State of Montana,
County of Silver Bow,—ss.

A. C. McDaniel, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the defendant named in the foregoing action,

and makes this verification for and on behalf of defendant for the reason that said defendant is a corporation and has no officer within the county where affiant resides; that he has read the foregoing petition, knows the contents thereof, and that the matters and things therein stated are true to the best of his knowledge, information and belief.

A. C. McDANIEL.

Subscribed and sworn to before me February 18th, 1930.

[Notarial Seal] M. J. SHEEHAN,

Notary Public for the State of Montana, Residing at Butte, Montana.

My commission expires March 2d, 1931.

Service of the foregoing petition acknowledged and copy received February 19th, 1930.

LOWNDES MAURY,
R. LEWIS BROWN,
Attorneys for Plaintiff.

Filed March 7, 1930. [76]

THEREAFTER, on March 7th, 1930, order allowing appeal was duly filed herein in the words and figures following, to wit: [77]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

It is ordered that the appeal of the defendant in the above-entitled action from the judg-

ment heretofore made, given and entered therein, in favor of the plaintiff and against the defendant, be allowed as prayed in defendant's petition for appeal filed herein, upon the defendant executing a bond according to law in the sum of fifty-five hundred dollars, and that upon due execution, approval and filing of said bond the same shall act as a *supersedeas* herein.

Dated March 3, 1930.

FRANK S. DIETRICH,
Judge.

Filed March 7, 1930.

THEREAFTER, on March 7th, 1930, assignment of errors was duly filed herein in the words and figures following, to wit: [78]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

The defendant in the above-entitled cause makes and files the following assignment of errors upon which it will rely upon its prosecution of the appeal in the above-entitled cause from the judgment therein entered on the 24th day of December, 1929:

1.

The Court erred in overruling the demurrer of the defendant to the complaint

2.

The complaint does not state facts sufficient to constitute a cause of action.

3.

The Court erred in denying the motion for a nonsuit.

4.

The evidence is insufficient to support the verdict, in that there is no evidence tending to show negligence in any of the particulars alleged in plaintiff's complaint.

5.

The Court erred in holding that there was any evidence that the negligence of the defendant, if shown, was the proximate cause of the death of the decedent, and in denying the defendant's motion for a nonsuit upon that ground.

6.

The Court erred in holding that section 3095, Revised Codes of Montana of 1921, was applicable to the facts of this case. [79]

7.

The Court erred in denying the motion for a nonsuit upon the ground that the evidence shows that the death of the decedent resulted from the negligence of his employer David Mottleson and not otherwise.

8.

The negligence of David Mottleson, the employer of Stewart Daly, is the efficient, proximate cause

of the injury to the decedent, not any negligence of the defendant—the negligence of Mottleson in operating the elevator and in placing the half portion of the fly-wheel where it could be struck by the elevator, and in employing decedent to work.

9.

The evidence fails to show that the decedent was employed by the defendant, but on the contrary shows that the decedent was employed by David Mottleson, an independent contractor, to do the work of Mottleson.

10.

The evidence shows that David Mottleson is the one guilty of negligence *per se,* in that, he is the one who employed the decedent to work, that he is the one who violated the statute, section 3095, R. C., and he is the prime or first mover in a course of events which led to the injury and death of the decedent.

11.

The evidence shows negligence on the part of the decedent in putting himself in a position where he could be injured, he not assisting in moving the fly-wheel, which negligence is not explained away by the plaintiff.

12.

The evidence fails to show any notice or knowledge on the part of the defendant that the decedent was working on the premises of the defendant.

13.

The Court erred in denying the motion for a non-

suit upon the ground that the defendant, under section 3095, R. C., was guilty of negligence *per se* in allowing the decedent to be upon its premises though employed by another, an independent contractor. [80]

14.

The Court erred in denying the petition for a new trial.

WHEREFORE, the defendant prays that said judgment be reversed and said action be finally dismissed.

JOHN K. CLAXTON,
A. C. McDANIEL,
Attorneys for Defendant.

Service of the foregoing assignment of errors acknowledged and copy received February 19, 1930.

LOWNDES MAURY,
R. LEWIS BROWN,
Attorneys for Plaintiff.

Filed Mar. 7, 1930.

THEREAFTER, on March 7th, 1930, bond on appeal was filed herein in the words and figures following, to wit: [81]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, Swift & Company, a corporation, the defendant above named, as principal, and the National Surety Company, a corporation organized

and existing under and by virtue of the laws of the state of New York, and qualified and authorized to execute bonds and undertakings and to act as surety generally within the state and district of Montana, as surety, are held and firmly bound unto Freda Daly, as administratrix of the estate of Stewart Daly, deceased, the plaintiff above named, in the full sum of fifty-five hundred ($5500.00) dollars, to be paid to the said plaintiff, her executors, administrators, successors or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with out seals and dated this 7 day of February, 1930.

Whereas, in the District Court of the United States in and for the District of Montana, in the above-entitled suit pending in said court between Freda Daly, as administratrix of the estate of Stewart Daly, deceased, plaintiff, and Swift & Company, a corporation, defendant, a judgment was rendered against the said defendant, which judgment was entered on the 24th day of December, 1929, and the said defendant has petitioned for an appeal from said judgment to the Circuit Court of Appeals of the United States, for the Ninth Circuit, and an order has been prayed allowing said appeal, and said defendant proposes to prosecute said appeal to reverse the said judgment, and desires that execution [82] be stayed pending the determination of said appeal,—

Now, therefore, in consideration of said appeal and said supersedeas the condition of this obligation is such that if the above-named Swift & Company, a corporation, the said defendant, shall prosecute its said appeal to effect and answer all damages and costs, if it fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

SWIFT & COMPANY.
By W. W. SHERMAN,
Assistant Treasurer.

[Corporate Seal] Attest: J. E. CORBY,
Assistant Secretary,
Principal.

NATIONAL SURETY COMPANY.
[Corporate Seal]
By ALBERT L. STARRS,
Attorney-in-fact,
Surety.

Countersigned at Helena, Montana.
H. L. HART,
Resident Vice-president.

The foregoing bond approved this 3d day of March, 1930.

FRANK S. DIETRICH,
Judge.

It is agreed that the within bond is sufficient in form and amount.

LOWNDES MAURY,
R. LEWIS BROWN,
Attorneys for Plaintiff.

State of Illinois,
County of Cook,—ss.

I, Warren H. Burns, a notary public of Cook County, in the State of Illinois, do hereby certify that Albert L. Starrs, Attorney-in-fact, of National Surety Company, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed and delivered said instrument, for and on behalf of National Surety Company for the uses and purposes therein set forth.

Given under my hand and notarial seal at my office in the city of Chicago, in said County, this 7th day of February, A. D. 1930.

[Notarial Seal] WARREN H. BURNS,
Notary Public. [83]

State of Illinois,
County of Cook,—ss.

Before me, a notary public in and for said County and State, personally appeared W. W. Sherman and J. E. Corby, Assistant Treasurer and Assistant Secretary respectively, of Swift and Company, and acknowledged that they executed the within instrument for the uses and purposes therein set forth.

Witness my hand and notarial seal this 7 day of February, A. D. 1930.

[Notarial Seal] F. O. CLARK,
Notary Public.

Commission expires June 1, 1931.

KNOW ALL MEN BY THESE PRESENTS, That the National Surety Company, a New York corporation, having its principal office in the City, County and State of New York, doth hereby make, constitute and appoint Albert L. Starrs, of Chicago, of the State of Illinois, its true and lawful attorney-in-fact, with full power and authority to sign, execute, acknowedge and deliver in its name, place and stead, as surety, bonds, undertakings and writings, obligatory in the nature thereof, and when said bonds, undertakings and writings obligatory are signed by the said Albert L. Starrs as such attorney-in-fact, to bind the Company as fully and to the same extent as if the same were signed by the President of the Company, sealed with its common seal, and duly attested by its Secretary; and the said Company hereby ratifies and confirms all the acts of the said attorney-in-fact done pursuant to the power and authority herein given.

This Power of Attorney, is made and executed in accordance with and by authority of the following by-law adopted by the Board of Directors of the National Surety Company at a meeting duly called and held on the third day of October, 1922, which reads as follows:

ARTICLE XII.—Resident Officers and Attorney-in-Fact.

SECTION 1.—The Chairman, Vive-Chairman, President or any Vice-President may from time to time, appoint Resident Vice-President, Resident

[84] Assistant Secretaries and Attorneys-in-Fact to represent said act for, and on behalf of the Company, and either the Chairman, Vice-Chairman, President or any other Vice-President, the Board of Directors, or the Executive Committee may at any time remove any such Resident Vice-President, Resident Assistant Secretary or Attorney-in-Fact and revoke the power and authority given them.

SECTION 4.—ATTORNEYS-IN-FACT. — Attorneys-in-Fact may be given full power and authority to execute for and in the name, and on behalf of, the Company, and *and* all bonds, recognization, contracts of indemnity, and other writings obligatory in the nature of a bond, recognizances or conditional undertakings, and any such instrument executed by any such Attorney-in-Fact shall be as binding upon this Company as if signed by the Chairman, Vice-Chairman or President and sealed and attested by the Secretary.

SECTION 6.—ATTORNEYS-IN-FACT. — Attorneys-in-fact are hereby authorized to verify any affidavit required to be attached to bonds, recognizances or contracts of indemnity, policies of insurance, and are also authorized and empowered to certify to a copy of any By-Law contained in Articles VI, and XIII of the By-Laws of the Company.

IN WITNESS WHEREOF, the National Surety Company has caused these presents to be signed by its Vice-President and its corporate seal to be hereto

affixed, duly attested by its Assistant Secretary, this 22d day of December, A. D. 1926.

NATIONAL SURETY COMPANY,
By J. L. MEE,
Vice-president.
Attest: E. A. COLLINS,
Assistant Secretary.

State of New York,
County of New York,—ss.

On this 22d day of December, A. D. 1926, before me personally came J. L. Mee, to me known, who, being by me duly sworn, did depose and say, that he resides in the City of New York; that he is the Vice-President of the National Surety Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; [85] that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

[Notarial Seal] M. M. MILLER,
Notary Public.

State of New York,
County of New York,—ss.

I, B. R. Hoogland, Assistant Secretary of the National Surety Company, do hereby certify that the above and foregoing is a true and correct copy of a power attorney, executed by said National Surety Company, which is still in full force and effect.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Company, at the City of New York, this 7th day of February, A. D. 1930.

[Corporate Seal] B. R. HOOGLAND,
Assistant Secretary.

THEREAFTER, on March 7th, 1930, citation on appeal was duly filed herein in the words and figures following, to wit: [86]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States of America, to Freda Daly, as Administratrix of the Estate of Stewart Daly, Deceased, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal filed in the Clerk's office of the United States District Court for the District of Montana, wherein Swift and Company, a corporation organized and existing under and by virtue of the laws of the State of West Virginia, is appellant, and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy

justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK S. DIETRICH, United States Circuit Judge for the Ninth Circuit, this 3d day of March, 1930.

FRANK S. DIETRICH,
U. S. Circuit Judge.

Service of the within and foregoing citation on appeal admitted and copy received this 7th day of March, 1930.

LOWNDES MAURY,
R. LEWIS BROWN,
Attorneys for Appellee. [87]

[Endorsed]: Filed Mar. 7, 1930. [88]

THEREAFTER, on March 7th, 1930, praecipe for transcript on appeal was duly filed herein in the words and figures following, to wit: [89]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT ON APPEAL.

To C. R. Garlow, Clerk of the Above-entitled Court:

Please prepare a transcript of the record for the purpose of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment entered in the above-entitled cause on the 24th day of December, 1929, in favor of the plaintiff and against the defendant, and include therein the following:

The complaint of plaintiff.

The demurrer to complaint.

The entry of May 14, 1929, showing overruling of demurrer.

The answer of defendant.

The reply of the plaintiff.

The minute entry showing cause on trial.

The verdict.

The judgment.

The bill of exceptions as settled, allowed and filed.

The petition for a new trial.

The order denying new trial.

The defendant's petition for appeal.

The order allowing appeal.

The assignment of errors.

The bond on appeal.

Citation.

This praecipe.

JOHN K. CLAXTON,
A. C. McDANIEL,
Attorneys for Defendant.

Service of the foregoing praecipe acknowledged and copy received February 19, 1930.

LOWNDES MAURY,
R. LEWIS BROWN,
Attorneys for Plaintiff. [90]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 91 pages, numbered consecutively from 1 to 91, inclusive, is a true and correct transcript of the record and proceedings had in the within entitled cause and the whole thereof required, by praecipe filed, to be incorporated in said transcript, as appears from the original records and files of said court and cause in my custody as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original citation issued in said cause.

I further certify that the costs of said transcript amount to the sum of Twelve and 25/100 Dollars ($12.25), and have been paid by the appellants.

WITNESS my hand and the seal of said court at Butte, Montana, this 26th day of March, A. D. 1930.

[Seal]

C. R. GARLOW,
Clerk as Aforesaid.
By L. R. Polglase,
Deputy. [91]

[Endorsed]: No. 6112. United States Circuit Court of Appeals for the Ninth Circuit. Swift and Company, a Corporation Organized and Existing Under and by Virtue of the Laws of the State of West Virginia, Appellant, vs. Freda Daly, as Administratrix of the Estate of Stewart Daly, Deceased, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Filed March 28, 1930.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.